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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

In re W.S. et al., Persons Coming
Under the Juvenile Court Law.

LOS ANGELES COUNTY
DEPARTMENT OF CHILDREN
AND FAMILY SERVICES,

Plaintiff and Respondent,

v.

L.M.,

Defendant and Appellant.

B299495

(Los Angeles County
Super. Ct. No. DK12426B,C)

APPEAL from orders of the Superior Court of Los Angeles County, Stephanie M. Davis, Judge. Conditionally affirmed and remanded with directions.

Michelle L. Jarvis, under appointment by the Court of Appeal, for Defendant and Appellant.

Mary C. Wickham, County Counsel, Kristine P. Miles, Assistant County Counsel, and Stephen D. Watson, Deputy County Counsel, for Plaintiff and Respondent.

Father challenges juvenile court orders denying his request to reinstate family reunification services and terminating his parental rights. We remand the matter to allow the Department of Children and Family Services (Department) and juvenile court fully to comply with the Indian Child Welfare Act (25 U.S.C. § 1901 et seq.) and related California law and otherwise conditionally affirm. Statutory references are to the Welfare and Institutions Code unless otherwise specified.

I

We summarize the facts and procedural history leading to the orders at issue. This appeal concerns two children, Son and Daughter, who were four years old and two years old, respectively, on the date of the orders.

A

We begin with the facts leading up to the court's initial order terminating Father's reunification services.

The family became involved with the juvenile court on August 6, 2015 when the Department filed a section 300 petition on behalf of Son because of Mother's drug abuse and because Mother's friend hit Son's face. Son was less than two months old. At a detention hearing the same day, the court detained Son from Father, ordered monitored visits for Father, and released Son to Mother's custody pending adjudication. The court ordered the Department refer Mother for random and on-demand drug testing. In December 2015, the court ordered drug testing for Father as well.

On April 11, 2016, when Son was nine months old, the court detained Son from Mother and Father. Mother and Father had missed several scheduled drug tests, the Department suspected they had been using drugs, and Mother had violated the court's order by allowing unmonitored visits by Father. The court placed Son with the family of his half-sibling and granted Father

monitored visits in a Department office. At 10 months old, the court placed Son with his maternal grandparents.

In August 2016, Mother gave birth to Daughter, who tested positive for amphetamine. Mother admitted using methamphetamine during pregnancy and Mother tested positive for amphetamine, methamphetamine, and opiates. Soon after Daughter's birth, the Department filed a section 300 petition on behalf of Daughter due to Daughter testing positive for drugs at birth, Mother's drug abuse, Mother's untreated mental illness, Father's failure to protect Daughter, and Father's failure to provide care and supervision for Daughter.

Father said he had been with Mother "all the time" during her pregnancy but he was unaware Mother used methamphetamine. He said he had not used any drugs in 20 years.

The court detained Daughter a week after she was born. It granted Father monitored visits with Daughter and ordered that Father be tested for drugs. Joining Son, Daughter began to live with maternal grandparents on August 19, 2016.

In the months that followed, Father had issues with drug and alcohol use. On December 13, 2016, he smelled of alcohol when he arrived for a visit with Son and Daughter. He said the smell was from beer that spilled from empty recycled bottles. That day and the next day, Father tested positive for amphetamine and methamphetamine. Father denied drug use and said someone must have tampered with his urine sample. After that, he missed five drug tests scheduled between the end of December 2016 and beginning of February 2017.

During the same time period, Father also had issues caring for the children during monitored visits. In December 2016, he gave infant Daughter juice instead of formula, did not know how to prepare formula, and the monitor had to remind him to burp Daughter after feeding her. When Father took the children outside

to play, the monitor had to intervene numerous times to prevent Son from running into a street and parking area. Father sometimes became tired during visits and once fell asleep.

Mother died from natural causes on January 9, 2017.

On February 16, 2017, the juvenile court sustained a section 300 petition on behalf of Daughter, finding Father was a current user of amphetamine and methamphetamine and was unable and unwilling to provide for Daughter. The court declared Daughter a dependent, removed her from Father's custody, and ordered Father to participate in a drug and alcohol treatment program, parenting classes, and counseling. The court granted Father continued monitored visits with Daughter.

On May 5, 2017, the juvenile court sustained Son's section 342 subsequent petition, finding Father's history of amphetamine and methamphetamine use put Son at risk of harm. The court granted Father continued monitored visits with Son.

Father denied substance abuse but continued to have issues with drugs and alcohol. He smelled of alcohol again at a visit on April 20, 2017, and tested positive for alcohol on May 15, 2017. Father's drug tests were diluted on June 13 and 19, 2017. A lab technician told the Department diluted tests meant people drank "a whole bunch of water before the test . . . more water than they would need to quench their thirst." People might do this to "flush their system." Father missed tests for six weeks in July and August 2017. He tested positive for amphetamine, methamphetamine, and alcohol on September 20, 2017. He said the test was an error.

Father continued to have issues caring for the children during his visits. The Department said he seemed to love the children very much, but as of April 2017 the monitor needed to intervene to ensure the safety of the children during visits, including ensuring proper feeding and diaper changing. A Department social worker

enrolled Father in a 12-week parenting course in April 2017 but Father did not attend.

The court ordered monitored visits three times a week for three hours each. Father agreed to visits two times a week for two hours each. In November 2017, the Department reported Father became tired after two hours on visits. In January 2018, the Department reported Father was unable to handle both children at the same time and Father requested to end visits after two hours.

Between his positive drug test in September 2017 and February 2018, Father tested negative for drugs and alcohol eight times but missed two consecutive tests. Department workers said Father appeared under the influence of alcohol or drugs at a meeting in February 2018. Father refused to take a drug test and said he was not willing to get treatment.

At a 12-Month Review Hearing on March 12, 2018, the juvenile court found Father only made partial progress in his case plan and returning the children to his custody would be detrimental to them. The court terminated Father's reunification services and set a section 366.26 permanency planning hearing.

B

We turn now to the facts between the termination of reunification services and Father's 388 petition.

Son and Daughter continued to live with maternal grandparents, who were committed to adopting the children. Son and Daughter had strong bonds with their grandparents. In a September 2018 status review report, the Department said Son sometimes asked for his Maternal Grandmother during visits with Father. Daughter called the Maternal Grandmother "mom." According to the Department, the grandparents provided a stable and loving home, ensured the children's medical needs were met, and provided age-appropriate toys and activities.

In June 2018, Father completed a 60-day residential drug-treatment program. He continued visits once per week for two hours each. He was timely, brought healthy snacks and activities, and tried to engage actively and to play with the children. The children seemed to enjoy spending time with Father. In March and May 2019, the Department reported Father struggled occasionally with handling the children during visits but he was making improvements.

C

We summarize Father's section 388 petition, the Department's and children's opposition to the petition, and the juvenile court's order.

On April 2, 2019, Father filed a section 388 petition asking the court to return the children to his care, to grant unmonitored visits, and to extend his reunification services. He said his circumstances changed because he consistently visited the children each week and he completed the following: a residential treatment program, individual therapy, and grief counseling.

On July 18, 2019, the juvenile court held a hearing on the petition. Father entered in evidence proof of completion of the drug treatment program and visitation logs from November 2018 through February 2019.

Father testified. He discussed his participation in the drug treatment program. He said he participated in Narcotics Anonymous meetings, did not crave drugs, and had a "clean lifestyle." He said he only ever missed drug tests if his name "wasn't on the list" of names at the testing facility.

Father still grieved Mother, he attended a grief management class, and his church had become a source of support.

Father testified about his weekly two-hour visits with the children and said he had been consistent with visits. He tried to have the children call him "dad" but "a lot of times" they called him

by his first name. He said he loves the children and they tell him they love him.

He discussed how he would care for the children. He had a home with one and a half bedrooms and separate beds for the children. He made some income from restoring cars but not “consistently.” He said he could find a new job in the aircraft industry.

At the hearing, Father’s counsel argued the court should return the children to Father because Father posed no safety risks, he completed drug rehabilitation, and he had a home for the children. Counsel argued reunification services with more visits would be appropriate, explaining, “[w]e don’t know if [Father] is able to care for the children because he hasn’t had that opportunity.”

The Department opposed Father’s petition. In its written response, it agreed Father had made progress and the decision was “difficult.” It questioned whether Father truly addressed his substance abuse issues, though. The Department cited the following: Father did not participate in aftercare services; he was not currently drug testing; of his 100 tests throughout the case, Father had nine positive or diluted tests, 41 missed tests, and 50 negative tests; and Father sometimes denied drug use in spite of his positive tests. The Department was concerned Father could not take care of the children by himself and he had difficulty disciplining them. Ultimately, the Department said it would be in the children’s best interests to deny the petition because it took a long time for Father to address his issues and because the children had bonded with their caregivers.

Counsel for the children asked the court to deny the petition. Counsel conceded “Father has done most, if not all, of his case plan.” Nonetheless, Counsel suggested the children’s bonds with Father were not strong. Father saw them once a week for two

hours. The children knew Father but “only so much as the monitored visits have allowed them to.” In contrast, the children had spent the majority of their lives with their maternal grandparents, who wanted to adopt them.

The court denied the petition. It found Father had shown a change in circumstances and he had substantially complied with his case plan, but reinstatement of services would not be in the children’s best interests. The court reasoned the length of time the case had been open and the children’s stability with their current caretakers tended to show it was not in the children’s best interests to reinstitute reunification services. The same day, the court ordered adoption as the permanent plan and terminated Father’s parental rights.

II

A juvenile court may change an order under section 388 if the petitioner establishes (1) there is new evidence or a change of circumstances and (2) the proposed change would be in the child’s best interests. (§ 388, subds. (a) & (d); *In re Mickel O.* (2011) 197 Cal.App.4th 586, 615 (*Mickel*).)

We review a juvenile court’s denial of a section 388 petition for abuse of discretion. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 318 (*Stephanie*).) A juvenile court’s denial of a section 388 petition after a full hearing rarely merits reversal. (*In re Kimberly F.* (1997) 56 Cal.App.4th 519, 522 (*Kimberly*).) We may not disturb the trial court’s decision unless it made an unreasonable or arbitrary determination. (*Stephanie, supra*, at p. 318.)

Father’s section 388 petition asked the court to return the children to his care, to grant unmonitored visits, and to extend his reunification services. In his appellate briefing, he says “[t]his appeal asks that the order denying father’s request for reunification services be reversed – not a request for placement.” Accordingly, we focus our analysis on the issue of reunification services.

Father argues we should reverse the juvenile court's order and instruct the juvenile court to grant him reunification services. The juvenile court agreed Father changed his circumstances but found Father did not prove it was in the children's best interests to reinstitute reunification services. The question thus is whether the juvenile court abused its discretion by finding it was not in the children's best interests to reinstitute reunification services. The court's determination was not unreasonable or arbitrary.

We further define "best interests" as relevant to a section 388 petition. The court considers section 388 petitions within the context of the proceedings. (*In re Marilyn H.* (1993) 5 Cal.4th 295, 307 (*Marilyn*)). After the court terminates reunification services, the focus shifts to the children's permanency and stability. (*Stephanie, supra*, 7 Cal.4th at p. 317.) Thus when a parent files a section 388 petition after the juvenile court has terminated reunification services, the best interests analysis is focused on the children's need for permanency and stability. (*In re J.C.* (2014) 226 Cal.App.4th 503, 527 (*J.C.*)). Furthermore, there is a rebuttable presumption out-of-home care will be in children's best interests. (*Marilyn, supra*, at p. 310.)

The court properly found Father did not overcome the rebuttable presumption out-of-home care was in the children's best interests. Father concedes "[t]he maternal grandparents do offer the children an adoptive home, which would provide them with permanency and stability." He says reinstituting reunification services would be nonetheless in the children's best interests because he "showed up and gave it his all, changed his circumstances, could provide stability and permanency, and shared a bond with his children."

In his opening brief, Father detailed his weekly two-hour monitored visits, which he says were "overwhelmingly positive" with only "rare mishaps." Several years into the case, Father

attended a 60-day drug rehabilitation program. He attended therapy and grief classes. This evidence does not definitively prove the children's best interests would be served by reinstating reunification services. The juvenile court could properly find Father did not overcome the presumption out-of-home care was in the children's best interest.

Father asks us to apply three "best interests" factors from the case *Kimberly*. These factors are: (1) the seriousness of the problem that led to the dependency and the reason the problem persists; (2) the strength of bonds between the children and parent and between the children and caretakers; (3) the nature of the changed circumstances and the reason the parent did not change sooner. (*Kimberly, supra*, 56 Cal.App.4th at pp. 530, 532.) The Department says we need not consider the *Kimberly* factors because the factors do not account for the shift in focus toward stability after a court terminates reunification services. (*J.C., supra*, 226 Cal.App.4th at p. 527.) Even applying the *Kimberly* factors, we find all factors could weigh against granting the petition and the juvenile court did not abuse its discretion.

The first *Kimberly* factor, seriousness of the problem, militated against the petition. (See *Kimberly, supra*, 56 Cal.App.4th at p. 532 ["A dirty house does not pose as intractable a problem as a parent's drug ingestion"].) The court removed children from Father's custody due to his drug use, which had spanned decades. Father tested positive for amphetamine and methamphetamine over a year after the Department filed the petition that started the case. He tested positive for these drugs again more than two years after the case began, which was also a year after Daughter was born testing positive for amphetamine.

Father changed his circumstances by completing a two-month drug rehabilitation program, but the Department offered evidence Father's substance use could remain a concern. Father was not

drug testing nor consistently participating in an aftercare program. Even though the problem did not seem to persist at the time of the section 388 hearing, the problem was serious. This factor supported the court's denial of the petition.

The second factor, the children's bonds with their caregivers and with Father, also weighed in favor of denying the petition. When the court decided it was not in the children's best interests to reinstate reunification services, Father had been visiting the children just once a week for two hours at a time. Throughout this years-long case, the children lived with and developed strong bonds with their grandparents but Father's visits remained supervised. The children did not consistently call Father "dad," but rather called him by his first name. In contrast, Daughter called her grandmother "mom." The court could properly find the children's bonds with their grandparents and the interests of permanency outweighed the children's interests in maintaining bonds with Father through reunification services.

Father emphasizes best interests cannot be a " 'simple comparison between households.' " (*Kimberly, supra* 56 Cal.App.4th at p. 530.) He does not show why this argument is relevant. The juvenile court did not compare households or relative wealth. It compared the stability, consistency, and time the children had lived with the grandparents versus Father.

The court properly considered the third factor, the nature of the changed circumstances and the reason Father did not change sooner. Father offered some evidence he changed and could provide permanency and stability, but the case had gone on for nearly four years. His issues with drugs were long-standing and his change was slow. He repeatedly denied he had issues with drugs. Even at the hearing on his section 388 petition, Father said he never missed drug tests unless his name was missing from a list. That did not square with the Department's evidence Father missed 41 tests.

Father's slow change and his denial about his issues with drugs weighed against granting his petition.

Father failed to prove reinstituting reunification services would be in the children's best interests. The juvenile court's denial of Father's petition was consistent with the evidence and not an abuse of discretion.

III

We turn to Father's claim under the Indian Child Welfare Act ("the Act"). He argues the judgment terminating his parental rights should be reversed and the case should be remanded for further proceedings to assure the Department complies with its statutory inquiry obligations under the Act and related California law. (See 25 U.S.C. § 1901 et seq.; Welfare and Institutions Code, § 224.2.) We remand and conditionally affirm the termination order. Father makes no argument the inquiry affects his section 388 petition.

On August 12, 2016, Mother completed a form saying she may have ancestry in an unknown tribe through her paternal relatives. Mother provided the name and telephone number of her father. The court acknowledged the form and the Department said it would call Mother's father. The Department concedes there is no evidence the Department made this inquiry and it says remand is appropriate to ensure proper inquiry.

We agree with the parties that the Department and court did not inquire sufficiently into the children's possible Indian status. We remand the matter for the juvenile court to direct the Department to conduct an investigation into the claim of Indian ancestry, including contacting the children's maternal grandfather. (See *In re Michael V.* (2016) 3 Cal.App.5th 225, 235–236 [conditionally affirming termination order and remanding].)

If the investigation produces any additional information substantiating the claim of Indian ancestry, the Department and the Court should proceed accordingly under the Act, including

complying with the Act's notice provisions. If the court finds the children are Indian children, it shall conduct a new termination hearing, as well as all further proceedings, in compliance with the Act and related California law. If not, the court's original termination order remains in effect.

DISPOSITION

We affirm the court's order denying Father's section 388 petition. The judgment terminating Father's parental rights is conditionally affirmed. We remand the matter to the juvenile court for compliance with the inquiry and notice provisions under the Act and related California law as set forth above and for further proceedings not inconsistent with this opinion.

WILEY, J.

WE CONCUR:

GRIMES, Acting P. J.

STRATTON, J.